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No. 94-1542

In the

Supreme Court of the United States

October Term, 1995

MEARS TRANSPORTATION GROUP, INC., CHECKER CAB COMPANY OF ORLANDO, INC., YELLOW CAB COMPANY OF ORLANDO, INC., MEARS SPECIAL SERVICES, INC., AIRPORT LIMOUSINE SERVICE OF ORLANDO, INC., ASHTIN LEASING, INC., D/B/A ACE METRO CAB AND GATOR CAB, AND PATATRANSIT RISK RETENTION GROUP OF MARYLAND, INC.,

Petitioner,

v.

FRED O. DICKINSON, III, AS EXECUTIVE DIRECTOR, FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether §3905(d) of the LRRA, entitled "State authority to specify acceptable means of establishing financial responsibility," excepts from preemption Florida's financial responsibility law, which requires owners and operators of commercial passenger transportation companies to obtain "dollar one" coverage for the first layer of liability to demonstrate financial responsibility to operate within Florida.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

Respondent does not dispute the dates of the filings and orders in this case set forth in Petitioners' jurisdictional statement.

STATEMENT

1. Respondent relies on the facts set out in the Eleventh Circuit's opinion below. *See Mears Transportation Group, Inc. v. Dickinson*, 34 F.3d 1013, 1014-16 (11th Cir. 1994).

REASONS TO DENY THE WRIT

This case does not present "special and important reasons," SUP. CT. R. 10.1, for the exercise of this Court's discretionary certiorari jurisdiction. As shown below, the issues were correctly decided by the lower court and are unlikely to have any substantial impact beyond the immediate parties. First, the decision of the Eleventh Circuit that Florida's financial responsibility law is not preempted by the federal Liability Risk Retention Act[1] (LRRA) rests on the statute and this Court's decisions. This Court has recognized that preemption must be specific. *Florida Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132 (1963). In 15 U.S.C. §3905(d), Congress expressly allowed states to prohibit the use of risk retention groups to satisfy state motor vehicle financial responsibility laws. Additionally, there is no proliferation of different interpretations concerning §3905(d). Thus, this case does not represent an issue of nationwide significance that merits this Court's attention.

The petition makes no attempt to show how this case could possibly meet the standards this Court normally applies in determining whether to grant certiorari, but concentrates instead on efforts to persuade the Court that petitioners'

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[1] 15 U.S.C. §3901, et seq.

individual claims of error have merit. That alone is not sufficient to warrant the extraordinary exercise of this Court's certiorari jurisdiction. Accordingly, this case does not warrant the "commitment of scarce judicial resources" that a grant of certiorari represents. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). Therefore, the writ should be denied.

I. FLORIDA'S FINANCIAL RESPONSIBILITY LAW IS PRECISELY THE TYPE OF LEGISLATION CONGRESS INTENDED TO EXCEPT FROM PREEMPTION BY THE LRRA.

A. Florida's financial responsibility law[2] is authorized by §3905(d) of the LRRA.

As amended in 1992, Florida Statute §324.031, entitled "Manner of proving financial responsibility," requires owners and operators of commercial passenger transportation companies to obtain "dollar one" coverage for the mandatory first layer of liability which is $30,000. Dollar one coverage refers to the obligation of an insurer to pay damages from the first dollar of liability to the limits of the coverage, including amounts encompassed by a deductible, in the event the insured is unable to meet this obligation. In doing so, §324.031 prohibits owners and operators of commercial passenger transportation companies from self insuring the first layer of mandatory liability insurance.

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[2] Florida Statute §324.031 (amended in 1992 by Session Law 92-29).

Prior to the 1992 amendment to §324.031, contained in Session Law 92-29, the commercial passenger transportation petitioners demonstrated their financial responsibility under state law by self insuring the first layer of liability, posting a $100,000 certificate of deposit with Florida's Department of Highway Safety and Motor Vehicles, and purchasing excess coverage from petitioner, Paratransit Risk Retention Group. Session Law 92-29 prohibited petitioners from self insuring the first layer of liability insurance for purposes of demonstrating financial responsibility, and therefore required petitioners to purchase "dollar one" insurance coverage for the first layer of mandatory liability coverage from a member of the Florida Insurance Guaranty Association (FIGA).[3] Although the commercial passenger transportation petitioners were prohibited from self insuring the first layer of liability, they were not prohibited from purchasing the excess insurance they had always purchased from petitioner Paratransit Risk Retention Group, and they continue to do so.[4]

Under the LRRA, businesses with similar types of risks may form and own their own insurance company to insure against liability exposures. 15 U.S.C. §3901(a)(4). Risk retention groups are self-insurance mechanisms in

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[3] The Florida Insurance Guaranty Association (FIGA) is established and governed by Part II, Chapter 631, Florida Statutes, to "[p]rovide a mechanism for the payment of covered claims under certain insurance policies . . . to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." §631.51(1), Fla. Stat. (1991).

[4] Petitioners continue to demonstrate financial responsibility under the old statutory scheme until this issue is resolved by this Court. *Mears, et al. v. Dickinson*, Nos. 93-2080, 93-2191 & 93-2608 (11th Cir. Feb. 15, 1995) (order granting stay of final mandate).

which the members self insure the first layer of liability and then purchase excess insurance from the group. Risk retention groups were first created to address the liability insurance crisis in the products liability area.[5] *See Home Warranty Corp. v. Caldwell*, 777 F.2d 1455 (11th Cir. 1985), *cert. denied*, 479 U.S. 852 (1986) (for a thorough review of the legislative history of the Product Liability Risk Retention Act). Later in 1986, Congress extended risk retention groups to other areas of insurance coverage.[6] H.R. Rep. No. 865, 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5303, 5305. As the Eleventh Circuit noted in its opinion below,

> [i]n so doing Congress recognized that the operation of risk retention groups would no longer be limited to "narrow groups of coverages" and therefore, would have wider application. Accordingly *Congress included in the 1986 amendments provisions to preserve the states' traditional role in regulating insurance and protecting the public*. As the legislative history indicates, Congress intended to "augment[] the authority of non-chartering states to regulate solvency, trade practices and other matters" and *"contemplated that States may enact statutes and issue regulations to protect the public to*

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[5] Product Liability Risk Retention Act of 1981, Pub.L. 97-45, 95 Stat. 949 (1982) (codified at 15 U.S.C. §§3901-3904(amended 1986)).

[6] Risk Retention Amendments of 1986, Pub.L. 99-563, 100 Stat. 3170 (1986) (codified at 15 U.S.C. §§3901-3906 (Supp. IV 1992)).

> *the extent such action is not exempt by th[e] Act."*

Mears, 34 F.3d 1017 (emphasis added) (footnotes omitted).

Specifically, Congress enacted §3905(d), entitled "State authority to specify acceptable means of establishing financial responsibility," which provides

> Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, ***nothing in this chapter shall be construed to preempt the authority of a state to specify acceptable means of demonstrating financial responsibility*** where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specific activities. ***Such means may*** include or ***exclude insurance coverage obtained from*** an admitted insurance company, an excess lines company, ***a risk retention group***, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group or any other person.

15 U.S.C. §3905(d) (emphasis added). Thus, §3905(d) expressly allows states to exclude insurance coverage obtained from risk retention groups for purpose of demonstrating financial responsibility. As the Eleventh Circuit correctly noted

> By amending [Florida's financial responsibility law through Session Law 92-29], the Florida legislature specified an acceptable means for owners and operators of for-hire passenger transportation vehicles to demonstrate financial responsibility; this means *includes* insurance coverage obtained from members of the FIGA and *excludes* the first $30,000 of insurance coverage obtained from non-members including risk retention groups. Thus, [Florida's financial responsibility law] as amended falls squarely within the language of §3905(d).

Mears, 34 F.3d at 1018 (emphasis in original) (footnotes omitted).

B. The Eleventh Circuit's decision is correct and does not merit this Court's review.

Petitioners claim that the Eleventh Circuit's analysis is factually and legally erroneous. Specifically, petitioners claim that the court erred because it did not define "discrimination" and because it did not address the alleged discriminatory impact of Florida's financial responsibility law.

Contrary to petitioners' assertion, the Eleventh Circuit fully addressed the anti-discrimination provision of the LRRA, contained in §3902(a)(4), which exempts risk retention groups from "state laws that discriminate against a risk retention group or any of its members." *Mears*, 34 F.3d at 1018. First, the court held that because Florida's

financial responsibility law prohibits commercial passenger transportation companies from self insuring with **any** self insurance scheme, the law does not single out risk retention groups. *Id.* Second, the court concluded that the extent to which the law precludes coverage obtained by a non-FIGA member, a class including but not limited to risk retention groups, is extremely narrow because it only applies to owners and operators of commercial passenger transportation vehicles and it only applies to the first layer of liability. *Id.* Lastly, the court held that Florida's financial responsibility law is a legitimate and rational exercise of the state's traditional authority to act in the public's best interest by providing citizens injured in commercial passenger transportation vehicles the protection of the state insurance guaranty fund. *Id.*

In short, the Eleventh Circuit applied the well-established rational basis test for "discrimination" used in evaluating economic regulations[7] and found no discrimination in this case. *See F.C.C. v. Beach Communications*, Inc., 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993); and *Nordlinger v. Hahn*, 505 U.S. ___, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992). As the Eleventh Circuit's analysis makes clear a law does not impermissibly "discriminate" under this standard so long as any difference in treatment "rationally furthers a legitimate state interest." Florida's financial responsibility law does not treat risk retention groups differently than other self-insurance schemes, it impacts all non-FIGA members not just risk

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[7] The LRRA does not itself define "discrimination," thus, the Eleventh Circuit's use of undisputed case law principles was correct.

retention groups, and it rationally furthers a legitimate state interest.

Petitioners next argue that the court did not address discriminatory impact.[8] The appellate court, however, did hold that there was "absolutely nothing in the record before [it] to support a finding of discrimination" and further that "[petitioners] have not at any time offered any evidence of discrimination. *Mears*, 34 F.3d at 1018.[9] Because the Eleventh Circuit's review of the record revealed absolutely no evidence of discrimination, the court had no reason to address discriminatory impact.

After this review the court analyzed the language of §§3905(d) and 3902(a)(4), giving each provision its full force and effect. In doing so, the Eleventh Circuit found that to interpret §3905(d) as Mears and Ashtin sought would render superfluous several other provisions of the LRRA specifically aimed at preserving state authority to exclude financially impaired risk retention groups. *Id.* at 1019. Thus, the court concluded that Florida's financial responsibility law is precisely the type of law Congress intended to except from preemption because it is squarely within the plain language of §3905(d).

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[8] Petitioners' argument regarding discriminatory impact also appears to be an impermissible attempt to resurrect their equal protection challenge to Florida's financial responsibility law which they dismissed without prejudice in the district court. Petition, p. 7.

[9] Because this was an appeal from the district court's grant of a motion for summary judgment, the court reviewed the record *de novo*. *U.S. v. Dakovich*, 11 F.3d 140, 141 (11th Cir. 1994) (citing *U.S. v. Wilson*, 894 F.2d 1245, 1254 (11th Cir.), *cert. denied*, 497 U.S. 1029 (1990)).

Contrary to the plain language of the statute, Petitioners argue that the correct interpretation of §3905(d) is that states' express statutory right to establish financial responsibility requirements is limited in that . . . a state may not "exclude insurance coverage obtained from a risk retention group." Petition, pp. 17-8. Petitioners' contrived interpretation of §3905(d) flies in the face of the plain language of that section which specifically authorizes states to establish means of demonstrating financial responsibility, and expressly allows states to exclude insurance obtained from risk retention groups for this purpose.[10]

The Eleventh Circuit was correct when it held that §3905(d) means what it says; that "nothing in [the LRRA] shall be construed to preempt the authority of a state to specify acceptable means of demonstrating financial responsibility" and that "such means may exclude insurance coverage obtained from . . . risk retention groups." *See Id.* at 1018; and 15 U.S.C. 3905(d). Accordingly, the Eleventh Circuit's decision does not merit this Court's review.

II. THERE IS NO "PROLIFERATION OF INCONSISTENT INTERPRETATIONS" REGARDING §3905(D) TO MERIT THIS COURT'S REVIEW.

The Eleventh Circuit's decision in *Mears* is undisputedly the first appellate decision on the merits to interpret §3905(d) of the LRRA. Petitioners claim that a

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[10] Petitioners rely on *Charter Risk Retention Group Ins. Co. v. Rolka*, 796 F. Supp. 154 (M.D. Pa. 1992), a memorandum opinion on a motion to dismiss, for this proposition. This case is of doubtful weight; it was settled before any decision on the merits was reached.

"proliferation of inconsistent interpretations" regarding §3905(d) exists to establish certiorari jurisdiction. To support this claim petitioners cite two district court cases. First, petitioners cite *Preferred Physicians Mutual Risk Retention Group v. Cuomo*, 865 F.Supp. 1057 (S.D.N.Y. 1994), currently on appeal before the Second Circuit. *Preferred Physicians* is factually distinguishable from the instant case. *Preferred Physicians* deals with New York's Excess Insurance Law[11] which offers free excess insurance to hospital-affiliated physicians who purchase medical malpractice insurance from New York insurers. In that case, the district court and both parties agreed that New York's Excess Insurance Law is **not** a financial responsibility law. *See Id.* at 1067 n.4. Therefore, New York's Excess Insurance Law does not fall squarely within -- or even near -- the language of §3905(d).

The district court further noted that *Preferred Physicians* differed from this case in that the intent of Florida's financial responsibility law at issue was to safeguard passengers in commercial passenger transportation vehicles by assuring access to the state's insurance guaranty fund. Thus, owners and operators of commercial passenger transportation vehicles were required to receive a certain amount of initial primary insurance from Florida insurers, but could then receive additional insurance from risk retention groups without restraint -- as the commercial passenger transportation company petitioners have done in this case. *Id.* The district court then noted that New York's Excess Insurance Law has exactly the opposite effect because it provides free additional excess insurance to physicians who

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[11] 1986 N.Y. Laws ch. 266, §18.

receive primary insurance coverage from New York licensed insurers and nothing to those who receive primary coverage through risk retention groups. The *Preferred Physicians* court concluded that New York's Excess Insurance law cannot "rationally further" the state interest of protecting physicians and their patients from irresponsible insurers because physicians are permitted to continue to obtain primary coverage from risk retention groups. *Id.* Because *Preferred Physicians* is factually distinguishable and presents a different issue from this case, it does not create a conflict worthy of certiorari jurisdiction.

To support their claim that this issue is one of national importance, petitioners also cite *Garage Services v. Homes*, 867 F.Supp. 1301 (E.D. Ky. 1994). As petitioners concede, however, *Garage Services* is not on point: it dealt with purchasing groups, which have a different preemption standard set out in the LRRA than risk retention groups. Purchasing groups are covered by specific partial preemptions, whereas, risk retention groups are covered by a general preemption with specific exceptions. *See Florida Dept. of Insurance v. National Amusement Purchasing Group, Inc.*, 905 F.2d 1361, 1363 (11th Cir. 1990); and *Insurance Co. of State of Pennsylvania v. Corcoran*, 850 F.2d 88, 91 (2d Cir. 1988) (comparing §§3902(a)(1) and 3903(a) of the LRRA). Because *Garage Services* deals with purchasing groups, not risk retention groups, it's relevance to the issue in the instant case is questionable.

The fact that the LRRA was enacted in 1986 and petitioners can cite only **two district** court cases, **neither of which interpret §3905(d)**, demonstrates that this case does

not merit this Court's attention. Accordingly, the petition should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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